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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

Federal Communications Commission  
Office of the Secretary

In re Application of  
  
SHIRLEY A. PENROD  
South Waverly, Pennsylvania  
  
WILLIAM F. O'SHAUGHNESSY  
South Waverly, Pennsylvania

File No. BPH-910708ME

File No. BPH-910703MK

Application for a New FM  
Station on Channel 241A

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To: The Commission

FM EXAMINERS

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AUGUSTIN, MISSISSIPPI

REPLY TO OPPOSITION TO PETITION TO DENY

William F. O'Shaughnessy, by his attorneys, herewith replies to the "Opposition to Petition to Deny" filed by Shirley A. Penrod on November 13, 1991 (Penrod Opposition).<sup>1/</sup>

If this matter were not so serious, Penrod's opposition would almost be amusing. It is, in effect, an admission that the allegations made by Mr. O'Shaughnessy in his "Petition to Deny" are accurate. We review the Penrod arguments briefly below:

I. The Petition is Not Procedurally Defective.

Penrod claims that the O'Shaughnessy petition is procedurally defective because it fails to contain an affidavit, although Penrod recognizes (Penrod Opposition, p. 1) that a petition can be properly grounded on facts with respect to which

<sup>1/</sup> The Penrod Opposition is untimely and has been opposed by O'Shaughnessy. Although the Penrod request for extension of time of November 6, 1991, recites that counsel had consented to Penrod's request, undersigned counsel did not do so.

the Commission can take official notice. All of the facts relied on by O'Shaughnessy in his petition were based on official FCC filings by Mr. Pfuntner, Ms. Penrod and their allies. It is surely dispositive of any claim that O'Shaughnessy's facts have been inadequately supported that not a single basic fact alleged by O'Shaughnessy and taken from Pfuntner/Penrod applications is disputed. Thus, this Penrod procedural claim is just nonsense.

## II. Mr. Olender Was Not Attacked.

The Penrod opposition and supporting affidavits submitted by both Ms. Penrod and Mr. Pfuntner also claim deep concern that the actions of their counsel, Mr. Olender, have been attacked. Drafted, no doubt, by the same fine hand, all three documents totally miss the point. Our argument was not that Mr. Olender had a conflict<sup>2/</sup> but that it was a fact of substantial significance that he did not find a conflict and that none of his clients with presumably conflicting interests appeared to exhibit concern about a conflict. Thus, there was no attack on Mr. Olender for improper representation of conflicting interests but there was an attack on Mr. Pfuntner and Ms. Penrod for having businesses that were so lacking in conflict that they could share the same counsel, even when that counsel also represented a presumably independent third broadcaster in the market, Nancy Nicastro. There is nothing "over-zealous" about pointing out the obvious.

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<sup>2/</sup> The worst that was said of him was that his appearances were "ubiquitous" (O'Shaughnessy Petition, p. 5).

### III. The Real Party In Interest Allegations.

Penrod's opposition says that O'Shaughnessy has engaged in "speculations and surmises" in attacking the bona fides of the Penrod application, even though we showed that it followed a common pattern of Pfuntner filings in Elmira and other Pfuntner markets. In fact, the Commission will not find a clear statement in the text of the Penrod opposition that Mr. Pfuntner has no relationship to the Penrod application. Nor is there any such statement in Mr. Pfuntner's attached affidavit of November 9, 1991, although it contains endless, irrelevant, accounts about what a nice fellow Mr. Pfuntner is. There is, however, in Mr. Pfuntner's affidavit a no-doubt-calculated admission that the same banks have been used by Mr. Pfuntner and others associated with him (Pfuntner Affidavit, p. 4) and that he has shared his chief engineer with other parties named in the O'Shaughnessy pleadings (Id., p. 5).

The Penrod Opposition appears to rely particularly on the fact that Mr. O'Shaughnessy had not, at the time his petition to deny was required to be filed by statute, been able to secure a personal affidavit in support of his allegations. As Mr. Pfuntner and his counsel obviously know, it is difficult to obtain incriminating evidence about such matters, particularly when businesses are closely held, in the absence of an ability to use compulsory process to subpoena documents or depose witnesses. There are a few people who are willing to volunteer statements under such circumstances.

Notwithstanding this difficulty, we are attaching (as Attachment 1) to this reply the affidavit of Norman Stull, a recent employee of Mr. Pfuntner's Elmira stations, who has direct evidence of control exercised by Mr. Pfuntner over the recently-granted Nicastro application for Southport, New York. Mr. Stull was, in fact, a member of a limited partnership organized by Mr. Pfuntner, of which Ms. Nicastro was to be the controlling partner and which was supposed to apply for the Southport facility. He apparently signed what he thought was a partnership document but, for reasons best known to Mr. Pfuntner, was excluded from the Nicastro filing. (Id.)

It is obvious from the Stull document that Mr. Pfuntner organized and controlled Ms. Nicastro's application which, it will be recalled, specified as its transmitter site Mr. Pfuntner's existing Elmira FM site and is represented by Mr. Olender. While we wish that Mr. Stull's affidavit could have been obtained prior to the filing of the original petition, its contents are obviously important enough to file it now and we have no objection to providing additional time for the filing of any comments with respect to it which Mr. Pfuntner, Ms. Penrod or Ms. Nicastro may wish to submit.

Of course, it is difficult to directly challenge at this point the Penrod claim that she is acting independently but Mr. Pfuntner's course of conduct is so obvious and the potential for representational conflicts so unusual that her protestations of independence must be view with substantial doubts, parti-

cularly when her husband is a key Pfuntner employee who will continue to serve their master.

IV. Conclusion

We are confident that there is much more evidence available demonstrating the illegality of Mr. Pfuntner's conduct. If and when additional information becomes available to us, it will be filed with the Commission. However, whether any additional affidavits or documentary material do become available, it is clear that there are more than adequate grounds for adding an issue with respect to Mr. Pfuntner and his control of Ms. Penrod in this proceeding.

Respectfully submitted,

WILLIAM F. O'SHAUGHNESSY

By Rainer K. Kraus  
Rainer K. Kraus

Koteen & Naftalin  
1150 Connecticut Avenue, N. W.  
Suite 1000  
Washington, D. C. 20036  
(202) 467-5700

His Attorneys

November 20, 1991

**STATEMENT OF NORMAN STULL**

1. My name is Norman Stull. I was an employee of WELM(AM) and WLKY(FM), Elmira, New York, from the end of February 1989 until May 1991. WELM and WLKY are owned by Robert Pfuntner. I served as a newscaster during morning programming, performed a mid-day air shift and also did some production work and sports broadcasts at the stations.

2. Approximately one and a half years ago--prior to the time that applications were required to be filed for a new FM station in Southport, New York--and, to the best of my recollection, on Mothers' Day of that year (May 13)--I was summoned to a meeting in the Conference Room of WELM. Present at that meeting were Robert Pfuntner, Nancy Nicastro (WELM's Business Manager), another WELM employee by the name of Jeff Whittaker and his wife, Judy, and another station staff member, Pat Salois.

3. At this meeting, Mr. Pfuntner described the Commission's action dropping in a new FM frequency in Southport, which is immediately adjacent to Elmira, and said--in substance and effect:

"You guys file for it and I'll put up the money."

Mr. Pfuntner said that if he controlled the Southport station, somebody else would not and advised us that the application that he wanted filed was to be a partnership in which Ms. Nicastro owned 51%, Jeff and Judy Whittaker owned 25%, Pat Salois had 12% and I had 12%. There was never any suggestion that any partner

would have to put personal funds into the venture and I never did so.

4. After this conference room meeting, I went to the offices of the law firm of Davidson and O'Mara in Elmira for the purpose of signing the partnership agreement for the Southport application. It is my recollection that there was an urgency in signing this document since the application was to be filed with the FCC shortly after that date.

5. In May of this year, during a brief vacation, Mr. Pfuntner sent me a letter dismissing me as an employee, allegedly because I had left the stations at the end of my normal shift (1:00 p.m.) even though I knew or was supposed to know that a strike was going to be <sup>SETTLED</sup> ~~called~~ later that day at the Schweitzer Aircraft Company, which makes helicopters. However, I believe that the real reason I was fired involved a station arrangement with the Nutri-System plan in which some employees agreed to lose weight and publicize their weight losses as part of a station advertising and promotion package with Nutri-System. Just before being terminated, I had advised Mr. Pfuntner that I had to stop using Nutri-System because the regimen was causing me stomach problems.

6. Only after I was dismissed did I learn for the first time that I was not part of the Nicastro Southport application and that it had been filed solely in her name. This information

was given to me by Mr. Ray Ross, the president and general manager of WEHH(AM), Elmira-Horseheads, New York.

7. The foregoing statements are true and are based on my personal knowledge.

Norman T. Stull  
Norman Stull

Subscribed and Sworn to before me  
this 28 day of October, 1991.

Karen C. Barnes  
Notary Public

My commission expires: 11-9-91

(SEAL)

KAREN C. BARNES  
Notary Public in the State of New York  
Qualified in Chemung Co. No. 490992  
Commission Expires Nov. 9, 1991



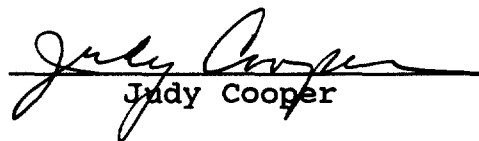
CERTIFICATE OF SERVICE

I, Judy Cooper, a secretary in the law firm of Koteen & Naftalin, certify that on the 20th day of November, 1991, copies of the foregoing "Reply to Opposition to Petition To Deny" were deposited in the U.S. mail, postage prepaid, addressed to:

Roy J. Stewart, Esquire\*/  
Chief, Mass Media Bureau  
Federal Communications Commission  
Room 314  
1919 M Street, N. W.  
Washington, D. C. 20554

Robert L. Olender, Esquire  
Baraff, Koerner, Olender  
& Hochberg, P.C.  
Suite 300  
5335 Wisconsin Avenue, N. W.  
Washington, D. C. 20015  
Counsel for Shirley A. Penrod,  
Nancy Nicastro, John Tickner  
and Robert J. Pfuntner

Charles W. Kelley, Esquire\*/  
Chief, Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
Room 8202  
2025 M Street, N. W.  
Washington, D. C. 20554

  
Judy Cooper

\*/ By Hand